UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

BURNDY LLC

-and

Case Nos. 34-CA-065746
34-CA-079296

GLASS MOLDERS POTTERY
PLASTICS & ALLIED WORKERS
LOCAL 39B

BURNDY LLC

-and
Case No. 34-CA-078077

IUE-CWA LOCAL 485

October 15, 2013

RESPONDENT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. <u>PRELIMINARY STATEMENT</u>

The Acting General Counsel (AGC) argues that this case deals with a "misguided power struggle" between the Company and the two unions that have represented its employees for over 50 years. (AB 2). There has been a struggle of sorts, but not a "misguided" one; from Burndy's perspective, the struggle has been to have its employees work during work time. The AGC also likens the relationship between Burndy and its two Unions to a bad marriage, but it is not a marital relationship. (AB 3). It is an employment relationship, where an employer, a party to a labor contract, provides wages, benefits and other terms and conditions of employment to its employees in exchange for the employees' work during work time . . . except that here, the employees are not fulfilling their side of the bargain. The evidence establishes that the Burndy has been dealing with this struggle for years, long before the purported "crackdown," and that it has involved disciplining Union officers and non-officers alike.

The AGC also broadly claims that Burndy's exceptions are based on credibility determinations by the ALJ, but in almost every instance, fails to identify any specific and/or relevant credibility determinations by the ALJ to support his claim. (AB 4). Burndy's arguments that the evidence does not support the ALJ's conclusions are not credibility arguments. Accordingly, for the reasons below and the reasons stated in Burndy's initial brief, the Board should grant Burndy's exceptions.

II. THE TIMING DOES NOT ESTABLISH A "CRACKDOWN" OCCURRED

In his effort to support the ALJ's decision, the AGC asserts that Burndy initiated a "crackdown" (a term not used by the ALJ) of Union officers after Norton's election to GMP President in June 2011 and the GMP's subsequent "increased activism" i.e. filing more

¹ "AB __" are references to the AGC's Answering Brief. "Br. __" are references to the Respondent's Brief in Support of Its Exceptions to the Decision of the Administrative Law Judged, dated September 18, 2013.

grievances and requesting information about a grievance; the petition sent to Burndy's upper management in January 2012 about Marczyszak; and the filing of the Initial Complaint in late January 2012. (AB 2-3, 11-12 26-27). The facts do not support the AGC's efforts.²

The petition to Burndy's upper management in January 2012 was not, as the AGC claims, an "unusual step (AB 24);" Burndy had received other petitions and anonymous letters concerning Marczyszak's management style since 2010. (Tr. 967, 1154, 1171). In 2008, members of both Unions wore red shirts on three consecutive Mondays in October to express their displeasure with plant management. (Tr. 772-74). Both Unions have pursued grievances to arbitration in the past. (Tr. 635-37). In short, the parties' relationship is indicative of "rough and tumble" industrial relations, not evidence of a "crackdown." (AB 2, 3).

Further, Robert Sears has a lengthy record of discipline that long predates June 2011. (R. 4(a)-(j)). He was not involved in any of the events leading to the alleged "crackdown" in 2011.³ Faced with this obvious inconsistency, the AGC argued that "Sears incurred Respondent's wrath" because "[h]e is the sole remaining face of the IUE, its only on-site representative, he filed a ULP charge on April 3 that rankled Respondent, and he has the temerity to challenge Rovello when she fabricates claims against him." (AB 32). This claim too falls short of the facts. Sears was not the only on-site IUE representative; Herman Barnes is, and Henry Agramonte was, an IUE steward as well. (Tr. 435, 639). There is no claim in this case that the Company retaliated against either of them. Also, the first allegedly unlawful discipline of Sears

² In response to Burndy's argument that the Board lacks jurisdiction to prosecute the case, the AGC cited to Belgrove Post Acute Care Center, n.1 (2013). That decision cites to Evans v. Stephens, 387 F.3d 1220 (11th Cir. 2004); United States v. Woodley, 751 F.2d 1008 (9th Cir. 1985); and United States v. Allocco, 305 F.2d 704 (2d Cir. 1962), which were decided prior to 2007, when the Senate first began to use pro forma sessions as a method to restrict the President's ability to make recess appointments. The Noel Canning line of cases, the only cases concerning the President's authority to make recess appointments during a pro forma session, has conclusively determined that the President's recess appointments are invalid. Further, the AGC did not address Burndy's argument that the AGC was not validly appointed pursuant to the Federal Vacancies Reform Act.

³ Sears had not signed the Cesa petition, did not file any charges against the Company until April 2012, and there is no evidence that he had increased the number of grievances he filed against the Company. (Tr. 553-54).

occurred on February 3,⁴ more than a month prior to the March 7 incident when Sears challenged Rovello, and two months prior to his filing a ULP charge on April 3.

Concerning the GMP officers, the evidence establishes that after Norton was elected President in June 2011, the GMP officers, who had previously respected Burndy's "work time is for work" rule, began to ignore the rule. Marczyszak testified that prior to this, GMP officers did not appear to be doing union work on work time. (Tr. 765). The GMP officers would meet during the morning or lunch break to prepare for a grievance meeting; if they needed to discuss anything during the meeting, they would take a five-minute caucus. (Tr. 765-66). The officers did not have "pre-meetings, post-meetings, everybody huddled together prior to" a meeting (Tr. 766). When Norton was elected as president, that changed. (Tr. 766). Joe Arnson complained to Marczyszak "a number of times" that "when he looked over at . . . Norton's bench, Tom Norton, Cavaluzzi, Robert Hing would be huddling up together periodically before coming in for either a grievance meeting, step two or three, or they were huddling up together after a step two step three grievance. And they were spending a fair amount of time with papers and books spread out on the table there . . ." (Tr. 764). Marczyszak in turn informed Arnson that "whenever you see those union guys getting together and they're not working you write them up." (Tr. 765). The alleged unlawful conduct occurring after June 2011 was Burndy's attempt to enforce an already existing rule to conduct not previously engaged in by the GMP.

Similarly, with regard to another of the alleged "triggering" events for the crackdown, i.e., the GMP's request for information and the Company's proposal that the GMP share in the costs of collecting that information, from the beginning, the Burndy denied these allegations and, on the second day of the hearing, after Norton testified, the AGC withdrew all of these allegations from the Consolidated Complaint. (Tr. 204-07). A charge so frivolous that it was

⁴ All referenced dates occurred in 2012 unless another year is specified.

withdrawn the second day of hearing hardly provides a reason for a "crackdown."

Accordingly, the ALJ's conclusions that Burndy began disparately enforcing, harassing, and unlawfully disciplining its employees based on their union activity are unsupported by the record and should be reversed.

III. BURNDY DID NOT DISPARATELY ENFORCE ITS "WORK TIME IS FOR WORK" RULE

A distinction which both the ALJ and AGC avoid is that employees may talk about anything during work time but must be working during work time. The AGC's summary of the record—"Five current employees testified without contradiction that they regularly are allowed to discuss things, while on the clock and at work, such as fishing, sports, hunting, politics, and the like, without restriction (emphasis added)"—is inaccurate. (AB 6). Domeracki and Vaast work in the Pattern Shop and can talk to each other throughout the workday while working. (Tr. 1054). The testimony of Norton, Hing, and Velez, similarly does not establish that employees may stop working to talk to one another without restriction because there is no evidence whether their conversations lasted beyond an "exchange of pleasantries," whether the employees were working while talking, or whether Burndy was aware of conversations lasting longer than an "exchange of pleasantries." See Br. at 22-26. Also, the AGC does not dispute the legal support provided by Burndy that conversations between supervisors and employees is not evidence that Burndy allowed employees to stop working and speak to one another beyond an "exchange of pleasantries." See Br. at 26-27. Accordingly, the record does not support the ALJ's conclusion that employees were permitted to stop working to talk to one another without restriction.⁵ (ALJD

⁵ The AGC repeatedly recounts the 8(a)(1) violations which the ALJ found and to which Burndy did not except. (AB 7-14). However, the 8(a)(1) violations dealt with the content of Arnson and Butlers' counselings, not with the Company's right to approach employees who appear not to be working to ask whether they are working.

26). The record establishes instead that Burndy's supervisors approached non- officials⁶ as well as Union officers⁷ when they did not appear to be working.⁸

Also, contrary to the AGC's claim and the ALJ's conclusion, there is no evidence that "only union talk was prohibited." (ALJD 28; AB 22). Instead, the evidence establishes just the opposite. In the Pattern Shop (all GMP employees) where employees can work while talking, employees can talk about any subject. (Tr. 697). Accordingly, the ALJ's conclusions that Burndy disparately enforced its "work time is for work" rule should be reversed.

IV. BURNDY LAWFULLY DISCIPLINED SEARS, THE GMP OFFICERS AND VELEZ.

The AGC does not dispute that Burndy is permitted to enforce the waiver provision in the IUE labor contract which prohibits IUE members from conducting union activity while on work time, or the provisions in the IUE and GMP labor contracts regarding the break times permitted for bargaining unit employees. (Br., Sec. VI.B). Nor does the AGC dispute that the ALJ's Decision does not recognize the Company's rights under those negotiated collective bargaining

⁶ While the AGC makes light of Burndy's efforts to require employees to work during work time and refers to these efforts as "harass[ing] everyone at the shop equally," the fact is that Burndy's supervisors have approached employees—whether Union officials or not—when they do not appear to be working prior to any of the events alleged in the Consolidated Complaint, and they continue to do so today. (Br., Sec. VI.I). Accordingly, for the reasons stated in Burndy's initial brief, the ALJ's conclusions that Burndy harassed the Pattern Shop employees and Norton and Hing should be reversed. See Br., Sec. VI.I.

⁷ The AGC accuses Burndy of misstating the record based on Burndy's summary of the ALJ's decision: "Arnson and Butler did not begin approaching employees to ask what they were doing until the Summer of 2011." (AB 4, 5). Burndy did not misstate the record. The ALJ concluded that "Although Arnson testified that when he saw employees talking he asked them why they were 'bothering' one another, it was apparent that he began using this technique after Marczyszak modified his directive to write up 'union guys' who did not appear to be working on the assumption that they were engaged in union business, as discussed below." (ALJD 27). The ALJ also concluded that "the evidence does not establish that, prior to 2011, Burndy prohibited all non-work related conversations unless the employees involved continued to physically perform work-related tasks." (ALJD 27). She then concluded, "The evidence further establishes that in the summer of 2011, Marczyszak specifically instructed other managers to alter their approach to employee discussions of nonwork-related issues during work time (emphasis added)." (ALJD 28). Accordingly, the ALJ's conclusion was that Arnson began asking employees whether they were being bothered as a result of Marczyszak's directive in 2011. The ALJ also concluded that Arnson and Butler's "overall pattern of conduct, albeit without specific references to union business or union activity, in asking these employees what was going on, what they were doing, or what they were talking about after their initial explicit references to union activity" was unlawful. (ALJD 31). Implicit in the ALJ's finding is her conclusion that prior to June 2011, Arnson and Butler did not approach employees to ask what they were doing.

⁸ See Br. at 48 for discussion regarding the reasons why it is not always readily apparent whether Norton, Hing or the GMP officers are working.

agreements. <u>Id.</u> For these reasons alone, the ALJ's conclusions that Burndy unlawfully disciplined its employees in retaliation for their Union activity should be dismissed.

In its primary brief, Burndy included a chart of the disciplinary incidents in this case, the union officer status of those involved in the incident, and an indication of who was disciplined. See Br., Sec. VI.D.3. Burndy argued, and the AGC did not dispute, that the only reasonable interpretation of this information was that the sole determinative factor in issuing discipline was whether an individual was working, not union officer status. <u>Id</u>.

Also, despite the AGC's statement that "no one else has been disciplined for simply talking to another employee," the record contains a number of disciplines to non-officer employees for talking and not working. (AB 22, R. 25(z), R. 25(q), R. 3(a), R. 25(m), R. 25(k)). The AGC's attempt to distinguish these disciplines by characterizing them as disciplines for being out of one's work area is not a valid distinction. (AB 33-34). Employees other than Sears, Norton and Hing, work on the shop floor and are required to wear hearing protection, making it impossible to carry on a conversation with one another during work time unless they do so in one of the quieter areas, away from their work area. (Tr. 658, 697). In contrast, Sears and all the GMP officers work, to varying extents, in work areas which are quiet enough that they can talk while still in their work area; also Sears, Norton and Hing do not have a fixed work area. (Tr. 658, 972). In any case, the AGC made no effort to distinguish the cases cited by Burndy that inconsistent application of a rule does not equate to disparate enforcement. (Br., p. 29; 32, n.36).

Further, neither the AGC nor the ALJ appears to suggest that Burndy does not have the right to respond to its employees not working. Burndy had previously lawfully disciplined employees for not working by referring to the underlying misconduct in the discipline rather than referring to "loafing." (R. 2(c)-(d), 2(f)-(g), 3(a)-(b), 4(a)-(b), 4(d)-(e), 4(i)-(j), 25(a)-(a)(2),

28(a), 28(d)). The only dispute thus appears to be whether Burndy may refer to the misconduct as "loafing." If reverting to the prior method of discipline i.e. referring to the underlying conduct, would demonstrate that Burndy was not disparately applying the policy, then this is truly a matter of form over substance.⁹

Finally, while Arnson and Butler told employees it would be assumed if they were together that they were conducting union business, there is no actual evidence that Burndy acted on this assumption. (AB 28). Indeed, despite Burndy's repeated efforts to discover whether there was a work-related reason why the disciplined employees were observed not working, the employees refused to provide Burndy with any reason or provided non-credible reasons. (Tr. 253-54, 340, 403-04, 611, 620, 726-27, 897-99, 901-05, 742, 913-15, 749-50, 906, 875). For instance, despite Burndy's efforts to learn whether Sears was engaged in work-related activity when disciplined, Burndy did not learn until the hearing that Sears had been conducting union business on three of the four occasions he was disciplined. (Tr. 437, 459, 481). The AGC has not disputed the cases cited by Burndy that a good-faith investigation need not necessarily be the most complete or exhaustive investigation. (Br. at 43). With respect to the other incidents, on February 8, Rovello observed Norton, Cavaluzzi, Vaast and Domeracki studying a Union contract (Tr. 866), and on April 13, Velez admitted he was not working and instead, talking to

⁹ The AGC disputes Burndy's assertion that the ALJ's conclusion that "Lochman . . . directed Rovello to explicitly refer to "loafing" or general rule 9 in disciplinary documentation, 'once things got a little bit more confrontational, where we saw the increase in grievances' on the part of the Unions" was based solely on the ALJ's mistaken reading of Rovello's testimony regarding Freitas (not Cavaluzzi) smoking. (AB 19). The AGC asserts that this conclusion was based on a reading of Rovello's entire testimony. However, his assertion ignores the context of the ALJ's conclusion, which follows a discussion regarding the record containing no evidence that Cavaluzzi was disciplined for smoking at any time after 2008. From this discussion, the ALJ concluded that "Rovello's testimony regarding the timing and motivation of the change in Burndy's disciplinary practice regarding citation to general rule 9 is not credible." (ALJD 36).

¹⁰ If Burndy was, as the AGC claims, "assuming" the worst whenever it observed two Union officers together, Burndy would have disciplined each Union officer it observed talking to another Union officer. (AB 28). Instead, however, it only disciplined those employees who were not working. See Br., Sec. VI.D.3.

¹¹ The AGC's attempt to paint Burndy as "obsessed" (AB 23) and targeting Union officers based on "guilt by association" (AB 25) is unwarranted especially since Sears specifically admitted that on three of the four occasions for which he received discipline, he was conducting union business. (Tr. 437, 459, 481).

Cavaluzzi (Tr. 910). Accordingly, these disciplines were based on Burndy's reasonable belief that the employees were not working.

A. The February 3, April 12, May 3, and May 29 Incidents Concerning Sears

Summarizing the February 3 incident, the AGC stated Sears was "simply stopping to talk to a coworker (again, a known union official) for a minute when he received his first ever counseling for 'loafing.'" (AB 27). The AGC summarized the April 12 discipline¹² as "[Sears] stopped to talk to Hing for a minute and received a verbal warning." (AB 32). However, the ALJ did not make any credibility determination in either incident¹³ that the time involved was one minute; instead she found it "plausible," that the discussion remained "within the bounds of acceptable nonwork-related conversation on worktime, even if there is no work actually being performed." (ALJD 37, 40). For the reasons set forth in Burndy's initial brief, the ALJ's conclusions were unsupported by the evidence. See Br., Sec. VI.E.2.

Concerning May 29, the AGC opposes Burndy's exceptions based on Marczyszak's credibility, ¹⁴ but does not dispute that Arnson's testimony also established that Burndy lawfully disciplined Sears. Arnson, who the AGC has conceded is "candid" (AB 6) and "the only Respondent witness with an ounce of credibility" (AB 25) also testified that Sears was "sitting there with a soda in hand . . . like, "Oh, my God, deer in headlights." (Tr. 1111). Then both Marczyszak and Arnson testified that Marczyszak said to Arnson, "you're my witness." (Tr. 751, 111). Further, Sears' conduct was exactly the type of conduct that Burndy had previously

¹² Hing was also disciplined for this incident and the ALJ's conclusion that his discipline was unlawful should also be dismissed for the same reasons.

¹³ The AGC did not mention the May 3 discipline at all in his Answering Brief.

¹⁴ Notably, while the AGC disputes Marczyszak's credibility regarding the May 29 incident, he does not dispute that Marczyszak's testified credibly regarding the May 3, April 12, and May 3 incidents.

¹⁵ Marczyszak testified "[h]e was sitting in a chair, lounging back. He had a soda in hand like this. He was – a shocked expression on his face as I pulled [the curtain] open and he saw me." (Tr. 749).

¹⁶ The AGC noted, "Respondent's sudden restriction of allowing Sears to simply photocopy a grievance (an act which takes a few seconds and was previously allowed) has had the predicted chilling effect that Respondent

disciplined as non-work activity during work time: the December 14, 2011 discipline to Hing for getting a coffee during work time; the March 9, 2011 discipline to Hing for sitting on a bench in the locker room during work time; the November 23, 2010 discipline to Eliezer Ruiz for getting water in the lunch room during work time. (R. 2(f), 2(h), 25(p)). Velez also agreed that an employee sitting down, drinking a soda while on work time was unacceptable. (Tr. 391).

B. The February 8 Incident Concerning Norton and the Pattern Shop Employees

Here also, the AGC opposes Burndy's exception based on Rovello's credibility (AB 29-30), but has not disputed that the witnesses for the AGC establish that Burndy lawfully disciplined Norton, Cavaluzzi, Vaast, and Domeracki. There is no dispute that not one of the employees responded to Rovello with a work-related reason when she asked them what they were doing. (Tr. 253-54, 403-04, 611, 620). Also, not one of them disputed Rovello's testimony that Cavaluzzi said "sorry" when he placed the Union contract back into his desk drawer. (Tr. 255, 421-22, 618-19). It is also undisputed that neither Norton (19, Vaast nor

evidently sought to create when it harshly disciplined Sears for using the photocopier to copy a grievance." (AB 31). The ALJ dismissed the allegation that Burndy unlawfully prohibited IUE representatives from using Burndy's photocopier for copying grievances. (ALJD 46).

The other credibility issues raised by the AGC regarding Rovello are irrelevant to the exceptions filed by Burndy. Concerning the forklift incident (AB 15-16), Rovello's testimony concerning the grievance meetings has no relevance to the actual incident observed by Butler, who issued the discipline. Also, the testimony recounted by the AGC merely reflects that Rovello did not know at the time of the Step 2 grievance meeting what book Sears was referring to and that at Sears' Step 3 meeting, she tried to probe the issue further since Hing had informed her the book was the Union contract. Given Sears' history of obfuscating the truth, Rovello acted properly. Concerning the March 2 meeting with the GMP (AB 16-17), her credibility on these issues is irrelevant; the ALJ dismissed the allegations concerning the March 2 meeting. Concerning whether Lochman had previously been consulted prior to issuing counselings, again, Rovello's testimony on this issue does not undermine the fact that Burndy disciplined these individuals because they were not working during work time.

¹⁸ While the AGC speculates that Rovello "confidently added details in her testimony concerning Cavaluzzi that she had to know would go unchallenged" after she learned he would not be testifying at the hearing (AB 30), the AGC is well aware that in his file there is an initial response to Charge No. 079296, dated July 29, 2012, which states that when Rovello approached the huddle, Cavaluzzi "placed the Union contract back into his drawer and apologized." ¹⁹ The AGC speculates that Norton "lost his cool" when issued his counseling on February 10 because "he had just been doing his job when [Rovello] approached them in the pattern shop." (AB 29). Norton also became upset while testifying about the March 2 meeting (ALJD 33, n.49), but the ALJ dismissed all the allegations concerning this meeting. Norton's anger is obviously not a proxy for whether conduct is lawful.

Domeracki were able to recall anything about the pattern they had allegedly been looking at.²⁰ (Tr. 254, 422, 619). Finally, the AGC does not dispute that he did not call Sanchez or Seal to rebut the admissions made by either Sanchez or Seal.

C. The April 13, 2013 Incident Concerning Velez

The AGC, like the ALJ, said that Velez had been "swept up," and that "this is exactly the scenario that, given the testimony of Marczyszak described above, would not warrant disciplinary action." (AB 31). The AGC did not attempt to distinguish any of the cases cited by Burndy or address any of Burndy's arguments why Velez's discipline was lawful and that his discipline actually demonstrates that Burndy was not retaliating against its Union employees. Thus, based on the foregoing reasons and the reasons articulated in Burndy's primary brief, the ALJ's conclusions that Burndy unlawfully disciplined its employees are unsupported by the record and should be reversed. See Br., Sec. VI.D, VI.E, VI.F, VI.G, VI.H.

V. THE ALJ'S PROPOSED NOTICE IS OVERBROAD

The Act only protects "protected concerted activity," not all conduct, and certainly not conduct which prevents an employer from "oversee[ing] the work performed in the facility, and [] ensur[ing] that the employees are productive." (ALJD 32). The AGC's "compromise," fails to remedy the over breadth of the first two "We will not" paragraphs." (AB 37). An employee could still interpret the AGC's proposed notice to permit employees to stop working and engage in activities on behalf of the IUE or GMP during work time without disciplinary repercussion. The ALJ's Proposed Notice should be modified as proposed by Burndy.

VI. CONCLUSION

For the foregoing reasons and the reasons stated in Burndy's initial brief, and based on the record as a whole, the Board should reverse the ALJ on the excepted-to issues.

²⁰ See Br., n.15.

Respectfully submitted,

THE RESPONDENT, BURNDY LLC.

By: /s/ Michael J. Soltis

Michael J. Soltis Joan C. Luu

JACKSON LEWIS LLP 1010 Washington Blvd., 7^{th} Floor

Stamford, CT 06901 Tel: (203) 961-0404 Fax: (203) 324-4704

Its Attorneys

Dated: October 15, 2013 Stamford, Connecticut

CERTIFICATION OF SERVICE

This is to certify that a copy of the foregoing was sent by certified mail, on this 15th day of October, 2013 to the following:

Thomas Norton, President Glass Molders Pottery Plastic & Allied Workers Local 39B 186 Eaton Street Oakville, CT 06779

Robert Sears IUE-CWA Local 485 373 Prospect Street Naugatuck, CT 06770

Serge A. Ambroise Kennedy, Jennik & Murray, PC 113 University Pl. Fl. 2 New York, NY 10003

Mr. Thomas E. Quigley
National Labor Relations Board, Region 34
A.A. Ribicoff Federal Building
450 Main Street, Ste. 410
Hartford, CT 06103

Lauren Esposito Administrative Law Judge 120 West 45th Street, 11th Floor New York, New York 10036-5503

Joel P. Biblowitz Associate Chief Administrative Law Judge 120 West 45th Street, 11th Floor New York, New York 10036-5503

> /s/ Joan C. Luu Joan C. Luu